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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 824.

WILLARD DAIRY CORPORATION,

Petitioner,

vs.

NATIONAL DAIRY PRODUCTS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION.

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BRIEF IN OPPOSITION.

QUESTION PRESENTED.

Should the Court of Appeals have affirmed the order of the District Court granting summary judgment for respondent on the ground that there was no genuine issue as to whether there was commerce involved within the meaning of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act (15 U. S. C. § 13(a)) where the price discrimination relied upon involved a wholly intrastate price differential within the intrastate area in which petitioner and respondent compete.

STATUTES AND RULES INVOLVED.

Respondent denies the pertinency of that portion of 15 U. S. C. § 12 (the third paragraph) quoted at page 19 of the petition, as respondent is conceded to be a "person." The second paragraph of said section, defining "commerce," is involved and is printed in the Appendix hereto, at p. 15.

STATEMENT OF THE CASE.

In order to demonstrate that the courts below were correct in granting and affirming summary judgment, respondent will accept, with two exceptions,* petitioner's Statement of the Case as far as it goes. Two additional facts, which plaintiff omitted, are dispositive of this case.

First, the alleged price discrimination upon which it relied was wholly intrastate. The only price differential mentioned in the complaint resulted from purely intrastate transactions, to-wit, a higher price in Marion, Ohio than in neighboring Ohio towns served by respondent's Shelby, Ohio processing plant (4a-5a).

Second, respondent's Shelby operation is wholly intrastate and involves no interstate commerce. Both the sales

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* There is no evidence to support petitioner's statement that respondent's price was a loss price to it (Pet., p. 5). There is no competent evidence supporting petitioner's statement that respondent's price reduction was a retaliatory move against Page Dairy Company (Pet., p. 5). This averment is based upon petitioner's own self-serving answer to respondent's interrogatory and the affidavits of the co-owner of Kinley Dairy and the vice-president of Page Dairy (21a-22a; 57a; 59a). In each of these documents the allegations upon which petitioner relies are patently hearsay and clearly incompetent under Rule 56(e) of the Federal Rules of Civil Procedure. *Alger v. United States*, 252 F. 2d 519, 521 (5th Cir. 1958). See also *Automatic Radio Mfg. Co. v. Hazeltine*, 339 U. S. 827, 831 (1950). Even if petitioner's allegations be assumed *arguendo*, the fact remains that neither a loss price to petitioner nor the motive for a challenged price differential is relevant to the question of whether jurisdiction is present.

area served by and the milk production area supplying respondent's Shelby processing plant are wholly in the State of Ohio (10a).

Petitioner makes no claim that respondent made any interstate sales at a price higher than that charged in the area of competition (Pet., pp. 4-5). There is neither allegation nor proof concerning the price charged by respondent's Canton, Ohio plant in its sales to West Virginia (52a-57a). The price charged by respondent's Toledo, Ohio processing plant to the Tecumseh, Michigan dairy was substantially lower than the lower of the two prices charged by respondent's Shelby, Ohio plant, and relates to a different functional level of competition (50a). Furthermore, for all that appears in the affidavit to which petitioner refers, the Tecumseh dairy purchased the milk in Toledo, Ohio so that there was no interstate sale by respondent (50a).

ARGUMENT.

Section 2(a) of the Robinson-Patman Act is inapplicable because the only price discrimination alleged in the complaint involved wholly intrastate sales. The judgment of the Court of Appeals is directly in accord with all of the lower court decisions on this point. There is no conflict between the decisions of this Court and the judgment of the Court of Appeals as to the lack of jurisdiction under Section 2(a) on the undisputed facts.

The opinion of the Court of Appeals is a concise yet abundantly documented statement of the pertinent facts and applicable law (Pet., pp. 13-18). Respondent submits that the petition should be denied for the reasons and on the authorities there set forth. This brief will supplement that opinion and demonstrate that the decisions of this Court are fully consistent therewith.

The Court of Appeals based its decision upon the language of amended Section 2(a) of the Clayton Act (15 U. S. C. § 13(a)), the Robinson-Patman Act, as interpreted by this Court and a significant number of lower courts. Nowhere in its Argument does petitioner refer to the pertinent language of that statute, which reads:

> "It shall be unlawful for any person engaged in commerce, *in the cour of such commerce*, either directly or indirectly to discriminate in price * * * *where either or any of the purchases involved in such discrimination are in commerce* * * *." (Emphasis supplied.) (Pet. p. 20.) *

Here, none of the purchases involved was in interstate commerce. As is plain from the italicized words of the statute, it is not enough that the respondent be engaged in interstate commerce. The statute requires that at least one of the specific sales complained of be in the course of interstate commerce. In *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231 (1951) this Court said:

> "In order for the sales here involved to come under the Clayton Act, as amended by the Robinson-Patman Act, they must have been made in interstate commerce * * *." (l. c. 236-37.)

The nature of the alleged discrimination cannot be stressed too much. On page 6 of its brief, petitioner repeats what is abundantly clear from its complaint (4a-5a):

> "*The sales complained of by petitioner were those made by respondent in the wholly intrastate market in which the parties compete*, those made in the area of competition at prices drastically reduced from prices prevailing theretofore. The reduced prices were charged throughout the area serviced by re-

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* "Commerce" is defined in 15 USC § 12 as interstate or foreign commerce. (App., p. 15.)

spondent's Shelby plant except for the area in and around Marion, Ohio, * * *" (Emphasis added.)

The *only* price differential referred to in the complaint is the price charged in Marion, Ohio, by respondent's Shelby, Ohio, processing plant. This price was higher than that charged in the neighboring Ohio communities served by said plant. Since both the high and low sales were made in Ohio and all milk sold from said plant was produced and processed in Ohio, this is a purely intrastate price differential. Respondent has admitted that it does engage in some interstate commerce in some parts of the country, (6b-7b). Yet no interstate transactions are involved in the discrimination of which petitioner complains.

The heart of petitioner's argument is that:

> "In order to make a prima facie case as regards the 'commerce' requirement, petitioner submits that it need show only that the respondent was engaged in commerce and that respondent made two sales of like grade and quality at two different prices and that one of the prices was charged on a sale in interstate commerce." (Pet., p. 11.)

Since respondent admittedly charged two prices from its Shelby, Ohio, processing plant, any interstate sale of milk by some other processing plant of respondent must have been at a "different" price than one of these two prices. The essential question heretofore decided adversely to petitioner thus becomes: Is the jurisdictional requirement of Section 2(a) satisfied by the mere fact that respondent engages in some interstate commerce in some parts of the country, or does Section 2(a) require that at least one of the two different prices to which the complaint is addressed shall have been charged in an interstate sale? Respondent submits that the answer to this question is obvious from the language of the statute, and confirmed by prior decisions.

The opinion of the Court of Appeals documents the long recognized distinction between the jurisdictional requirements of the Sherman Act (15 U. S. C. §§ 1-7, 15 note) and the Robinson-Patman Act (Pet., pp. 16-17). That opinion also cites seven cases where jurisdiction under Section 2(a) was found lacking because, although defendant was engaged or was alleged to have engaged in some interstate commerce, only intrastate sales were involved in the price discrimination of which complaint was made.* An additional case precisely in point is *Samuel Shlomchik v. Hygrade Bakery Co.*, 1952-53 Trade Cases ¶ 67,632 (E. D. Pa. 1953), where the court spoke as follows in granting a motion to dismiss a private action brought under Section 2(a):

> "In order to give the Court jurisdiction under the Robinson-Patman Act it is a *sine qua non* that the discriminatory transactions be 'in the course of such (interstate) commerce.' 'In order for the sales here involved to come under the Clayton Act, as amended by the Robinson-Patman Act, they must have been made in interstate commerce.' Standard Oil Co. v. Federal Trade Commission, * * * 340 U. S. 231, 236. The fact that the defendant conducts other business across state lines is not enough, nor is the additional fact that the effect of the discrimination may be to lessen or prevent competition with the person (the defendant in this case) who grants the benefit of such discrimination. * * *

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* *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 287 F. 2d 265, 267 (7th Cir. 1961), *cert. denied*, 368 U. S. 829 (1961); *Myers v. Shell Oil Co.*, 96 F. Supp. 670, 675-76 (S. D. Cal. 1951); *Massachusetts Brewers Ass'n v. P. Ballantine & Sons Co.*, 129 F. Supp. 736, 739 (D. C. Mass. 1955); *Northern California M. D. Ass'n v. Interment Ass'n*, 120 F. Supp. 92, 95 (S. D. Cal. 1954); *Danko v. Shell Oil Co.*, 115 F. Supp. 886 (E. D. N. Y. 1953); *Lewis v. Shell Oil Co.*, 50 F. Supp. 547, 549 (N. D. Ill. 1943); *Sears, Roebuck & Co. v. Blade*, 110 F. Supp. 96, 101 (S. D. Cal. 1953).

"Congress plainly did not intend to regulate every transaction of every business engaged in interstate commerce. The phrase 'in the course of such commerce' indicates an intent to limit the operation of the Act to interstate transactions and not to attempt to regulate such as are wholly intrastate, even though part of the seller's business may be interstate." (l. c. 68,992-93.)

Similarly, in *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (S. D. Cal. 1951), the court granted the defendant's motion for summary judgment on the basis that the acts complained of were wholly intrastate in character, regardless of the fact that the defendant was otherwise engaged in interstate commerce. After noting that in the Sherman Act Congress intended to regulate any intrastate activity which affects interstate commerce the Court said:

"Section 2(a, c, d, f), 15 U. S. C. A. § 13(a, c, d, f), and Section 3 of the Robinson-Patman Act, 15 U. S. C. A., § 13a, contain, however, the specific language that it shall be unlawful for any person '*engaged in commerce*' to do any of the prescribed acts '*in the course of such commerce.*' Thus, in enacting the provisions of the Clayton and Robinson-Patman Acts here under consideration, Congress did not exercise all of its power over commerce, but dealt only with persons engaged *in commerce* and with restraints *in the course of commerce.*

"There is no question but that defendant Shell Oil Company is engaged in interstate commerce. The question is therefore presented whether the acts alleged to constitute the violations of Section 2 of the Clayton Act and Section 3 of the Robinson-Patman Act were committed 'in the course of [interstate] commerce.' * * * [P]laintiffs' allegation as to the source of the oil does not bring the conduct complained of in the course of interstate commerce as

provided for in the Clayton and Robinson-Patman Acts, because the petroleum products here involved were refined in California and sold and delivered to plaintiffs within the State of California. The transactions between the plaintiffs and the defendant were therefore wholly intrastate in character." (l. c. 675-76.)

Although there are no decisions by this Court involving a parallel factual situation, the rationale of both *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231 (1951) and *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349 (1941) is in full accord with the Court of Appeals' decision. In *Standard Oil*, this Court held that sales in the Detroit area from petitioner's bulk storage plant in River Rouge, Michigan were made in interstate commerce within the meaning of Section 2(a) of the Robinson-Patman Act because the gasoline had been refined in Indiana, and did not come to rest by reason of the bulk storage in Michigan. There would have been no reason for this Court to base its decision on whether the gasoline had "come to rest" if petitioner's interpretation of Section 2(a) were valid.

In *Bunte Bros.*, this Court held that the Federal Trade Commission was without authority under Section 5 of the Federal Trade Commission Act (15 U. S. C. § 45) to prevent an Illinois candy maker from making and selling, wholly within that state, candy in so-called "break and take" assortments, even though out-of-state candy makers were barred under *Federal Trade Commission v. Keppel & Bros.*, 291 U. S. 304 (1934) from selling such assortments in interstate commerce as an unfair method of competition. This Court construed Section 5, which forbids using unfair methods of competition "in commerce," to apply only to sales of candy made in interstate commerce

(312 U. S. at 350-51). Later this Court specifically rejected the Federal Trade Commission's contention that the statute should be read as if it encompassed "unfair methods of competition in any way affecting interstate commerce" (312 U. S. at 355).

Respondent submits that "in commerce" in Section 5 is, if anything, broader than "in the course of such commerce" in Section 2(a) of the Robinson-Patman Act. It is clear from the Court of Appeals' opinion, *Bunte Bros. v. Federal Trade Commission*, 110 F. 2d 412, 413 (7th Cir. 1940) that Bunte was engaged in selling candy throughout the United States, although it limited its "break and take" sales to Illinois. The *Bunte* decision furnishes strong support by analogy for respondent's position that allegedly discriminatory intrastate sales from respondent's Shelby plant are beyond the scope of Section 2(a).

In opposition to this formidable array of precedent, petitioner relies almost entirely on certain obiter dicta appearing in *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115 (1954). In *Moore* the discrimination involved interstate price variation. In selling bread from its Clovis, New Mexico, plant, Mead charged a lower price in Santa Rosa, New Mexico, than in Farwell, Texas. One sale was clearly intrastate; the other inescapably interstate. It was this price differential which plaintiff challenged. Therefore the statutory requirement that the discrimination take place in the course of interstate commerce, i.e., that one sale involved be made in such commerce, was met. If Marion were located in Indiana instead of Ohio, the geographical situation, at least, would be parallel to *Moore*.

The foregoing factual distinction was clearly recognized in *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 287 F. 2d 265 (7th Cir. 1961), *cert. denied*, 368 U. S. 829 (1961). This decision involved competing manufac-

turers of ice cream in the Chicago area. The District Court held that there was no price discrimination in the course of interstate commerce, 184 F. Supp. 312 (N. D. Ill. 1960). The Court of Appeals upheld this ruling:

> "By the express terms of the statute it is essential to establish a violation that the discrimination in price be between purchasers of commodities of 'like grade and quality' *and* that at least one of the purchases 'involved in such discrimination' be a purchase in interstate commerce. The concurrence of these requisite factors is lacking in the instant case. The only sales of like grade and quality were solely in intrastate commerce—a fact not appearing from the complaint but disclosed by the stipulated proof. This fact serves to distinguish the instant case from *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, * * * primarily relied upon by Central.
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> "In *Moore* the corporation charged with violating 15 U. S. C. A. § 13 was engaged in the baking business at Clovis, New Mexico and sold bread to retailers in Santa Rosa, New Mexico and in Farwell, Texas, a town which it served with a bread truck operating out of Clovis. It cut its prices of bread in Santa Rosa where it was in competition with the petitioner, Moore, a local baker. But it did not cut its prices of bread in Farwell, Texas. It is evident that in *Moore* the requisite elements to establish a violation were present. Purchases involved in the discrimination were in interstate commerce. Interstate sales of like grade and quality were discriminated against. The higher prices were maintained as to Farwell purchasers." (l. c. 267.)

Although petitioner has repeatedly cited *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U. S. 536 (1960), it has made no showing of its applicability (Pet., pp. 6, 10, 11). No question of jurisdiction under the commerce requirement of Section 2(a) was raised or decided

in *Anheuser-Busch*. The case involved the question, not here raised, of whether a mere difference in price to non-competing purchasers constituted a "discrimination." The St. Louis plant of Anheuser-Busch sold in interstate commerce (363 U. S. at 540). The discrimination attacked was that a lower price was charged in St. Louis than in cities outside Missouri served by Anheuser-Busch from its St. Louis brewery.

Petitioner has confused matters by injecting a totally irrelevant issue into this case, i.e., the difference between primary and secondary line competition (Pet., pp. 9-11). This distinction, of importance with respect to issues of injury to competition, is totally irrelevant to questions of jurisdiction or the definition of "discrimination." *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U. S. 536 (1960). Petitioner is clearly in error when it states that "The Court of Appeals in the instant case has erroneously applied principles which are correctly applied only in secondary line cases." (Pet. p. 9.) As the principles pertaining to jurisdiction are precisely the same in both types of cases, petitioner's elaboration of this issue only muddies the waters.* The statute makes no distinction such as petitioner advocates, and no court has ever hinted that it exists.

The principles set forth as to jurisdiction in the various secondary line cases, conceded by petitioner to be sound, are equally applicable to the first line cases, and thus to this case. Whether the action is brought by the Federal Trade Commission, a competitor of the alleged

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* Petitioner attempts to distinguish the three *Shell Oil* cases relied upon by the Court of Appeals on the basis that these cases involved secondary line competition (Pet., pp. 9-10). *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (S. D. Cal. 1951); *Danko v. Shell Oil Co.*, 115 F. Supp. 886 (E. D. N. Y. 1953); *Lewis v. Shell Oil Co.*, 50 F. Supp. 547 (N. D. Ill. 1943).

discriminator or a customer of the alleged discriminator, the cases heretofore cited have uniformly required that at least one of the two different prices complained of be charged on an interstate sale. *Standard Oil Co. v. Federal Trade Commission, supra,* in no way undercuts the principle for which *Lewis v. Shell Oil Co.*, 50 F. Supp. 547 (N. D. Ill. 1943) was cited by the Court of Appeals. While *Standard Oil* might require the conclusion that the gasoline in *Lewis* had not "come to rest" and therefore remained in the "flow of commerce," the milk involved in this action was produced, processed and sold wholly in Ohio.

Respondent's contention that *Standard Oil, supra,* does not support jurisdiction in this case is buttressed by the following statement in Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), immediately after a discussion of *Standard Oil*:

> "But notwithstanding the 'flow of commerce' concept which may overcome the local storage of a product made elsewhere, price quotations by an interstate enterprise for commodities which it actually produces and resells within a single state are not covered by the Act." (l. c. 80) (Citing six of the cases cited by the Court of Appeals).

Petitioner's attempt to distinguish the secondary line cases evidences a misconception of the rationale of these decisions and the opinion of the Court of Appeals. The action below did not fail because petitioner does not compete in interstate commerce with respondent (Pet., p. 10). This is clearly irrelevant. It failed because the only price differential involved was that existing between Marion, Ohio and other communities served by respondent's Shelby plant, all of which were in Ohio. As petitioner admits, whether or not respondent made an interstate sale is immaterial to petitioner's claim of intrastate price discrimi-

nation (Pet., p. 10). The difference between this "fortuitous circumstance" and the "fortuitous circumstance" considered in *Anheuser-Busch* (363 U. S. at 546) is that Section 2(a) specifically requires one of the sales "involved in the discrimination" to be in commerce, whereas the statute contains no requirement of competition amongst purchasers in a first line situation.

Petitioner's attempt to distinguish the first line authorities relied upon by the Court of Appeals likewise fails (Pet., pp. 10-11). Regardless of the sufficiency of the allegations or proof of interstate sales not involved in the alleged discrimination, each of these cases specifically holds that there is no jurisdiction under Section 2(a) if wholly intrastate transactions are involved. Both *Massachusetts Brewers Ass'n. v. P. Ballantine & Sons Co.*, 129 F. Supp. 736 (D. Mass. 1955) and *Sears, Roebuck & Co. v. Blade*, 110 F. Supp. 96 (S. D. Cal. 1953) cite and rely upon *Lewis v. Shell Oil Company*, 50 F. Supp. 547 (N. D. Ill. 1943), one of the secondary line cases cited by the Court of Appeals. This is further proof of the invalidity of petitioner's attempt to distinguish the secondary line cases. The *Central Ice Cream* case is discussed *supra*, pp. 9-10. In *Northern California M. D. Ass'n v. Interment Ass'n*, 120 F. Supp. 93 (S. D. Cal. 1954) the Court said:

> "The Clayton Act applies only if (a) defendant is engaged in commerce and (b) defendant commits the prohibited acts in the course of such commerce. 15 U. S. C. A. § 13." (l. c. 95.)

In short, there is an unbroken string of authority, both before and after *Moore v. Mead's Fine Bread*, *supra*, holding that Section 2(a) of the Robinson-Patman Act means what it says. Petitioner's complaint is addressed to wholly intrastate sales of milk which was produced, processed and

sold within the state of Ohio. No interstate sale of milk by respondent was involved in the alleged discrimination.

Paraphrasing the language of *Lewis v. Shell Oil Co., supra,* the alleged price discrimination here in question was made in Ohio, the milk involved was produced by Ohio cows, and was shipped only from defendant's Shelby processing plant to purchasers located in Ohio. These are purely intrastate transactions outside the ambit of the Robinson-Patman Act.

The decision of the Court of Appeals is wholly consistent with the prior decisions of this and other courts which hold that the mere fact that respondent engages in some interstate commerce is not enough to meet the jurisdictional requirements of Section 2(a) of the Robinson-Patman Act.

CONCLUSION.

Respondent respectfully submits that this case was rightly decided by the Court of Appeals, that the statute in question has uniformly been interpreted as set forth in the opinion below, that no novel question of law is raised by this action, and that the petition should therefore be denied.

Respectfully submitted,

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APPENDIX.

15 U. S. C. § 12. Words defined:

"Commerce," as used herein [§§ 12, 13, 14-21, 22-27 of this title], means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, That nothing in this Act [§§ 12, 13, 14-21, 22-27 of this title] contained shall apply to the Philippine Islands.